A Definitional Approach to Secondary School Students Right to Know

I. INTRODUCTION

In establishing the first amendment rights of secondary school students, the Supreme Court maintained, "It can hardly be argued that . . . students . . . shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[1] Concurrent with the development of student rights has been an expanded recognition of first amendment freedoms to include the implied reciprocal of the right to express: the right to receive.[2] The scope of these two relatively recent first amendment developments has become a source of conflict when local secondary school authorities have attempted to remove socially and politically controversial books from public school libraries.[3] School board proscriptions have been countered by student first amendment "right to know"[4] lawsuits seeking declaratory and injunctive relief to require the return of excluded books to the library.[5]

The federal courts adjudicating this issue have been unable to agree upon the role of the first amendment in secondary school education. Several courts have held that the broad powers vested in local school boards permit discretionary limitations on student access to controversial materials. A nearly equal number of courts, however, have held that a social or political distaste for the message conveyed by a book is insufficient to justify its removal and the consequent infringement on student rights.[6]

The divergent results achieved in "school book" cases stand in sharp contrast to the similarity of the courts' approaches to the issue. In mediating the interests of students and school boards, courts have relied exclusively upon an ad hoc balancing approach. Ad hoc adjudication consists of case-by-

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1. Tinker v. Des Moines School Dist., 393 U.S. 503, 506 (1969).

2. Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756–57 (1976); Procunier v. Martinez, 416 U.S. 396, 408–09 (1974); Kleindienst v. Mandel, 408 U.S. 753, 762–65 (1972); Red Lion Broadcasting v. FCC, 395 U.S. 367, 390 (1969); Stanley v. Georgia, 394 U.S. 557, 564 (1969); Lamont v. Postmaster Gen., 381 U.S. 301 (1965); Griswold v. Connecticut, 381 U.S. 479, 482 (1965); Marsh v. Alabama, 326 U.S. 501, 505 (1946); Thomas v. Collins, 323 U.S. 516, 534 (1945); Martin v. Struthers, 319 U.S. 141, 143 (1943); Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U.L.Q. 1.

3. Pico v. Board of Educ., 638 F.2d 404 (2d Cir. 1980), *cert. granted*, 50 U.S.L.W. 3265 (1981); Zykan v. Warsaw Community School Corp., 631 F.2d 1300 (7th Cir. 1980); Minarcini v. Strongsville City School Dist., 541 F.2d 577 (6th Cir. 1976); President's Council, Dist. 25 v. Community School Bd. No. 25, 457 F.2d 289 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972); Bicknell v. Vergennes Union High School Bd. of Dirs., 475 F. Supp. 615 (D. Vt. 1979); Salvail v. Nashua Bd. of Educ., 469 F. Supp. 1269 (D.N.H. 1979); Right to Read Defense Comm. v. School Comm., 454 F. Supp. 703 (D. Mass. 1978).

4. *See* Minarcini v. Strongsville City School Dist., 541 F.2d 577, 583 (6th Cir. 1976).

5. *See* cases cited in note 3 *supra*.

6. Three courts have forbidden school boards' removing books from public school libraries: Minarcini v. Strongsville City School Dist., 541 F.2d 577 (6th Cir. 1976); Salvail v. Nashua Bd. of Educ., 469 F. Supp. 1269 (D.N.H. 1979); Right to Read Defense Comm. v. School Comm., 454 F. Supp. 703 (D. Mass. 1978). Three courts, however, have permitted books to be banished: Zykan v. Warsaw Community School Corp., 631 F.2d 1300 (7th Cir. 1980); President's Council, Dist. 25 v. Community School Bd. No. 25, 457 F.2d 289 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972); Bicknell v. Vergennes Union High School Bd. of Dir., 475 F. Supp. 615 (D. Vt. 1979).

case judicial weighing of competing interests.[7] Generally, such an approach is useful when (1) the government interests at stake are constitutionally neutral and thus judicially weighable; and (2) the need for a sensitive consideration of the merits of each case outweighs the need for a precedential rule.[8] When these ad hoc requisites are not apparent, however, a second form of first amendment analysis, definitional balancing, is appropriate.[9] A definitional approach uses balancing, not to ascertain the relative worth of a speech or governmental interest in a particular case, but to determine if a given expression is within a definitional base and, thus, protected speech under the first amendment. In contrast to the case-by-case transience of the ad hoc approach, definitional balancing produces a rule that defines the scope or sets the standard of first amendment freedoms.[10] Definitional balancing is properly employed when (1) government regulation of expression is content based; and (2) the need for a precedentially certain rule outweighs any loss in analytical sensitivity.[11]

This Comment will first explore the distinct factual circumstances in which ad hoc and definitional balancing are properly used. It will then be shown why the current application of ad hoc balancing to school book cases poses a significant threat to students' first amendment freedom. An alternative definitional approach to the first amendment rights of secondary school students will then be examined. Finally, this Comment will analyze the advantages of the definitional approach and the constitutional grounds supporting its adoption.

II. BALANCING AND THE FIRST AMENDMENT

A. *Ad Hoc Balancing*

It is well settled that first amendment freedoms are not absolute.[12] In many circumstances, expression or expressive acts may be subject to government regulation.[13] To determine the point at which a government interest bears sufficient importance to justify regulation of first amendment freedoms, courts have often applied an ad hoc balancing test.[14]

In the first amendment context ad hoc balancing weighs the government interest in regulating expressive activities with the consequent infringement on an individual's first amendment freedoms. *United States v. O'Brien*[15] pro-

7. *See* Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 912–14 (1963); Nimmer, *The Right To Speak From* Times *to* Time: *First Amendment Theory Applied To Libel And Misapplied to Privacy*, 56 CALIF. L. REV. 935, 938–47 (1968).

8. *See generally* Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975).

9. Nimmer, *supra* note 7, at 943–45.

10. *Id.*

11. *Id.*

12. *See* Adderley v. Florida, 385 U.S. 39 (1966).

13. *Id.*

14. Nimmer, *supra* note 7, at 943–45.

15. 391 U.S. 367 (1968).

vides a prominent example of first amendment ad hoc balancing.[16] O'Brien burnt his draft card on the steps of the South Boston Courthouse and was convicted for violating a federal statute that made it a criminal offense to knowingly mutilate or destroy a selective service certificate.[17] O'Brien argued that the federal statute was unconstitutional as applied because it restricted his first amendment freedom of expression.[18] The Court agreed that the "communicative elements" of O'Brien's expression were "sufficient to bring into play the First Amendment."[19] The Court ruled, however, that the government's interest in maintaining the selective service system was of sufficient importance to justify the incidental restriction on O'Brien's free expression.[20]

In *O'Brien* the Supreme Court outlined the requisite standards for first amendment ad hoc balancing:

> [W]e think it clear that a government regulation is sufficiently justified . . . [1] if it furthers an important or substantial government interest; [2] if the government interest is unrelated to the suppression of free expression; and [3] if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[21]

The Supreme Court's use of the ad hoc approach in *O'Brien* was predicated on the determination that the federal statute involved was "unrelated to the suppression of free expression."[22] The court reasoned that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."[23] In *O'Brien* the Court balanced the nonspeech interest of the government (maintenance of the selective service system) with the extent to which O'Brien's speech interest (protesting the Vietnam War) was impaired by the regulation.

The ad hoc approach is particularly useful when the focus of regulation is on the nonspeech elements of expressive conduct.[24] Nonspeech elements reflect government objectives that are constitutionally neutral and, therefore, unrelated to the message or content of an expression. In *O'Brien* the government was not regulating the speech aspects of draft card burning, but was protecting its constitutionally neutral nonspeech interest in maintaining the selective service system.[25] The usefulness of ad hoc balancing is contingent upon the existence of a neutral government objective that can be constitu-

16. *Id.* at 377.
17. 50 U.S.C. app. § 462(b)(3) (1976).
18. 391 U.S. 367, 376 (1968).
19. *Id.*
20. *Id.* at 386.
21. *Id.* at 377.
22. *Id.*
23. *Id.* at 376.
24. Ely, *supra* note 8, at 1496.
25. For a critique of the Supreme Court's analysis in *O'Brien*, *see* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 84 (1970).

tionally weighed against the first amendment interest in free speech. When, however, the government interest in regulation is focused on the speech elements of expression and is, thus, related to the suppression of free expression, the ad hoc approach is unworkable because there exists no neutral government interest to weigh in the balance.[26]

B. *Definitional Balancing*

When government regulation is focused on the content or communicative impact of expression, definitional balancing is the proper means of first amendment analysis.[27] Obscenity regulation is an area of content based control of expressive activities in which the definitional approach has been used. In *Miller v. California*[28] the Supreme Court set definitional standards for local regulation of obscenity:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[29]

The definitional standard enunciated in *Miller* is a starting point for first amendment analysis of content based regulation. Expression that falls under the definitional proscription is excluded from first amendment protection. Expression outside the definition, however, receives first amendment protection subject to a balancing with government interests based not on content per se but on secondary effects and circumstances.[30]

Miller and *O'Brien* represent two distinct forms of first amendment analysis. It is, therefore, important to consider the reasons for preferring the definitional approach over the ad hoc approach when government regulation is focused on the speech, as opposed to the nonspeech, elements of expression.[31]

C. *Definitional Versus Ad Hoc Balancing*

When government seeks to suppress ideas or information it considers dangerous to society, there exists no neutral objective to balance against free

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26. Ely, *supra* note 8, at 1501.

27. Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) (libel); Miller v. California, 413 U.S. 15 (1973) (obscenity); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) (fighting words).

28. 413 U.S. 15 (1973).

29. *Id.* at 24

30. In Young v. American Mini Theatres, 427 U.S. 50 (1976), a Detroit zoning ordinance prohibited "adult" establishments from locating within 1000 feet of each other or within 500 feet of a residential zone. The materials purveyed by these establishments were not legally obscene, yet the regulation was upheld over the free speech claims of the owners. In sustaining the ordinance, Justice Stevens argued that such regulation did not "violate the government's paramount obligation of neutralty" since it did not regulate "point of view" but instead was focused entirely on the deleterious secondary effects that concentrations of these establishments had on neighborhoods. *Id.* at 63.

31. Nimmer, *supra* note 7, at 938.

speech interests. Thus, if a court applies ad hoc balancing to content based regulation, there exists no guidance as to the weight that should be afforded the governmental, as compared to the free speech, interest. The weight a court does assign to the government interest, therefore, is left largely to judicial predilection.[32] Further, since the ad hoc approach, by its nature, produces no rule to guide future decisions,[33] courts are unable to rely on previous adjudications as guiding principles. This combination leaves courts unguided and unrestrained in their decision making.[34] For individuals who wish to engage in expressive activities, the absence of a neutral government interest against which they may weigh their proposed conduct, coupled with the lack of precedential guidance, results in uncertainty as to the protection the first amendment will provide for their conduct. Uncertainty is particularly pernicious when first amendment rights are at stake, for it tends to chill both protected and unprotected expression.[35]

To foster certainty and thereby overcome the chilling effect of the ad hoc approach, the Supreme Court has turned to definitional balancing.[36] The definitional rule adopted in *Miller* lessens the chill on expressive freedoms by providing a standard that parties and courts can use to demarcate protected from unprotected expression. For individuals who desire to disseminate materials that border on legal obscenity, the definitional rule adopted in *Miller* sets a standard by which they can gauge their activities to avoid conflict with the government's interest in regulation. Similarly, for government, the same definitional rule marks the point at which it may regulate individuals' expressive activities without fear of impinging upon constitutional freedoms. Thus, the definitional approach provides a measure of certainty for both expressive and governmental interests. More important than the certainty provided to these two interests, however, is the guidance the definitional rule provides courts.[37]

In refusing to apply the ad hoc approach to libel cases, the Supreme Court has argued that its use "lead[s] to unpredictable results and uncertain expectations."[38] These uncertain expectations are largely a result of the unconstrained judicial latitude that results when ad hoc balancing is applied to content based regulation. In that context ad hoc analysis is unbounded by interest weighing or precedential rules, and, thus, more room exists in the analysis for judges to insert their own prejudices. In contrast, it is much less likely that basic freedoms will be derogated by the political predilections of a majoritarian judge when decision making is delimited by a definitional rule

32. Ely, *supra* note 8, at 1497–1502.
33. Nimmer, *supra* note 7, at 938.
34. *Id.*
35. *Id.* at 939.
36. *Id.* at 944; Ely, *supra* note 8, at 1497.
37. Nimmer, *supra* note 7, at 945.
38. Gertz v. Robert Welch, Inc., 418 U.S. 323, 343 (1974).

that delineates the scope of first amendment protection.[39] To be sure, there still will be a measure of uncertainty as to how the definitional rule will be interpreted by a court in a specific case. This uncertainty does not detract, however, from the incremental certainty that the definition supplies, for in the sensitive realm of first amendment rights every additional degree of certainty wards off a degree of chill on the exercise of those rights.[40]

When first amendment rights are at issue, the proper analytical method, be it definitional or ad hoc balancing, is determined by the focus of the government regulation involved.[41] In school book cases courts have opted universally for the ad hoc approach. To determine the propriety of this decision, the basis for the school board's removal of books must be examined.[42]

III. SCHOOL BOOK BALANCING

A. *Application of the Ad Hoc Balancing Test to School Book Controversies*

The school library cases litigated in the federal courts possess a number of striking factual parallels. Typically, school book controversies begin when parents' groups object to the presence of certain books in the school library.[43] These objections commonly are occasioned by a distaste for the social or political message conveyed by the books.[44] Generally, courts have held that the contested books possess literary value and are not obscene.[45] In succumbing to parental pressure to remove objectionable books from public school libraries, school boards have triggered first amendment right-to-know lawsuits seeking the return of the contested books.[46]

The apparent factual similarities of these cases has had little effect on their resolution. The decisions extend from a dismissal for failure to state a claim[47] to a court order requiring the school board to replace proscribed

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39. Ely, *supra* note 8, at 1501.

40. Nimmer, *supra* note 7, at 939.

41. Ely, *supra* note 8, at 1486.

42. *Id.*

43. In Pico v. Board of Educ., 638 F.2d 404, 410 (2d Cir. 1980), *cert. granted*, 50 U.S.L.W. 3265 (1981), eleven books were banned by the local school board because a parent group had classified them as "anti-American, anti-Christian, anti-Semitic and just plain filthy." It was later discovered that among the forbidden books were two Pulitzer prize winners: Bernard Malamud's *The Fixer* and Oliver La Farge's *Laughing Boy*. *See* TIME, January 19, 1981, at 86. Prior to Zykan v. Warsaw Community School Corp., 631 F.2d 1300 (7th Cir. 1980), the local school board eliminated a "values clarification" class and gave the textbooks to a senior citizens group who, in a show of support for the board, publicly burned them. *See* NEWSWEEK, November 10, 1980, at 75.

44. Ambach v. Norwick, 441 U.S. 68 (1979); James v. Board of Educ., 461 F.2d 566 (2d Cir. 1972). In Keefe v. Geanakos, 418 F.2d 359, 361–62 (1st Cir. 1969), a school board, under parental pressure, dismissed a teacher for using a "dirty" word in the classroom. In reinstating the teacher the First Circuit reasoned, "We do not question the good faith of the . . . [school board] in believing that some parents have been offended. With the greatest of respect to such parents, their sensibilities are not the full measure of what is proper education."

45. Minarcini v. Strongsville City School Dist., 541 F.2d 577, 580 (6th Cir. 1976); Right to Read Defense Comm. v. School Comm., 454 F. Supp. 703, 714 (D. Mass. 1978).

46. See note 6 *supra*.

47. Zykan v. Warsaw Community School Corp., 631 F.2d 1300 (7th Cir. 1980).

books.[48] The inconsistent determinations in school book cases are a product of the misplaced use of ad hoc balancing.

The misuse of the ad hoc test is readily apparent when the balancing done in school book cases is compared with that done in *O'Brien*.[49] In *O'Brien* the United States Supreme Court began its analysis by acknowledging the broad governmental and first amendment interests at stake.[50] The Court proceeded, however, to base its ad hoc balancing not on these broad concerns, but on the specific impact of O'Brien's conduct on the neutral government objective of maintaining the selective service system.[51] The propriety of the ad hoc approach in *O'Brien* was occasioned by the presence of a neutral government objective that could be weighed against O'Brien's first amendment interests. Thus, to rationalize the use of the ad hoc balancing in school book cases there must be a neutral school board interest justifying the removal of books.

Several federal courts using an ad hoc approach to allow the removal of books have been creative in attempting to find this interest. While some courts have upheld book removal on grounds of inherent school board authority to control the educational environment,[52] many courts, in an apparent attempt to avoid first amendment conflict, have searched for objective factors to warrant the removal of books from public school libraries. In *Zykan v. Warsaw Community School Corp.*[53] the Seventh Circuit maintained that it is irresponsible for a school administrator to allow a book to remain in a school library when its utility fails to justify its use of "valuable shelf space."[54] The Second Circuit was equally imaginative in *President's Council, District 25 v. Community School Board No. 25*,[55] upholding the school board's "winnowing" of the library based on "financial and architectural realities."[56]

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48. Minarcini v. Strongsville City School Dist., 541 F.2d 577, 584 (6th Cir. 1976).

49. *See* text accompanying notes 19–24 *supra*.

50. *See* text accompanying notes 19–20 *supra*.

51. *Id.*

52. *See* President's Council, Dist. 25 v. Community School Bd. No. 25, 457 F.2d 289 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972), in which Judge Mulligan maintained that "[i]t would seem clear . . . that books which become obsolete or irrelevant or where improperly selected initially, *for whatever reason*, can be removed by the same authority which was empowered to make the selection in the first place." *Id.* at 293 (emphasis supplied). *See also* Epperson v. Arkansas, 393 U.S. 97 (1968), in which the Supreme Court declared that "[b]y and large, public education . . . is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." *Id.* at 104.

53. 631 F.2d 1300 (7th Cir. 1980).

54. *Id.* at 1308.

55. 457 F.2d 289 (2d Cir. 1972).

56. *Id.* at 293. It should be noted that the existence of an alternate means of access to proscribed books is not a constitutionally sufficient justification for their removal. In Minarcini v. Strongsville City School Dist., 541 F.2d 577 (6th Cir. 1976), it was reasoned that "[r]estraint on expression may not generally be justified by the fact that there may be other times, places or circumstances available for such expression." *Id.* at 582. In Schneider v. New Jersey, 308 U.S. 147 (1939), the Supreme Court explained that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Id.* at 163. In Young v. American Mini Theatres, 427 U.S. 50 (1976), the Supreme Court upheld access limitations on adult theaters (ordinance requiring adult establishments to be 1000 feet apart). Justice Stevens justified the ordinance's content based classification by noting that the near-obscenity regulated was "of a wholly different, and lesser, magnitude than the interest in untrammeled political debate." *Id.* at 70. The "lesser speech" analysis of *American Mini Theatres* distinguishes that case from the political and social content based restriction prevalent in school book controversies.

The facile and unsupportable justifications for book proscriptions advanced in *Zykan* and *President's Council* demonstrate that the circuit courts that have permitted the removal of books are conspicuously attempting to avoid addressing the actual motive behind the school boards' actions. The Sixth Circuit in *Minarcini v. Strongsville City School Dist.*,[57] however, went directly to the actual moving force behind the local school board's book proscriptions:

> In the absence of any explanation of the Board's action which is neutral in First Amendment terms, we must conclude that the School Board removed the books because it found them objectionable in content and because it felt that it had the power, unfettered by the First Amendment, to censor the school library for subject matter which the Board members found distasteful.[58]

The Supreme Court has held that the constitutionality of a school board's action may be determined by examining the reasons behind it.[59] In *Tinker v. Des Moines School District*[60] the Supreme Court upheld the right of secondary school students to wear black arm bands to protest the Vietnam War. The Court held that, in attempting to restrict the students' expressive conduct, the school board had failed to show a constitutionally neutral justification: "[C]learly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible."[61] Applying this analysis to school book controversies, it would appear that a mere social or political dislike for the content of a book would be constitutionally insufficient to sustain its removal.[62] Yet, several courts have permitted local authorities to purge public school libraries on just such a basis.

It is extremely doubtful that school boards are removing books because of their impact on "financial and architectural realities."[63] It could hardly be argued that the removal of one volume of *Catch-22* would solve a shelf space problem.[64] School boards are removing books because of a social or political distaste for their message.[65] The ad hoc balancing test is being used by courts as a subterfuge to conceal the suppression of controversial ideas. Such content based regulation has long been the prime target of the first amendment.[66]

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57. 541 F.2d 577 (6th Cir. 1976).

58. *Id.* at 582.

59. Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274 (1977).

60. 393 U.S. 503 (1969).

61. *Id.* at 511.

62. *See* Consolidated Edison Co. v. Public Service Comm., 447 U.S. 530 (1980), in which the Supreme Court reversed a New York Court of Appeals ruling on first amendment free speech grounds that had prohibited Consolidated Edison from enclosing controversial pro-nuclear power inserts with monthly electric bills.

63. President's Council, Dist. 25 v. Community School Bd. No. 25, 457 F.2d 289, 293 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972).

64. Minarcini v. Strongsville City School Dist., 541 F.2d 577 (6th Cir. 1976).

65. President's Council, Dist. 25 v. Community School Bd. No. 25, 457 F.2d 289, 293 (2d Cir. 1972).

66. In Police Dep't v. Mosley, 408 U.S. 92 (1972), the Supreme Court struck down a Chicago ordinance which prohibited picketing near a school but excepted peaceful picketing of any school involved in a labor dispute. Justice Marshall's opinion focused on the content based nature of the ordinance: "[Government] may not select which issues are worth discussing or debating in public facilities." *Id.* at 95–96.

The Supreme Court has held that "above all else the First Amendment means that government has no power to restrain expression because of its message, its ideas, its subject matter or its content."[67]

When regulation of expression is content based, ad hoc balancing cannot adequately protect first amendment freedoms.[68] Because courts cannot constitutionally balance the political or social content of a book, there has, in school book cases, been no neutral government objective to weigh against student first amendment freedoms. Thus, the relative value a court attaches to the school board's, as compared to the students', interests is dependent largely upon the prejudices of the court. It is true that school book ad hoc balancing has, in some instances, protected the students' first amendment right to know.[69] In a substantial number of cases, however, the ad hoc approach has facilitated a virtual disregard of student rights.[70] Content based ad hoc balancing licenses ad hoc devaluation of the principles underlying first amendment freedoms.[71] In a Second Circuit school book case, *Pico v. Board of Education*,[72] the concurring judge reasoned that

> [t]he symbolic effect of a school's action in removing a book solely because of its ideas will often be more significant than the resulting limitation upon access to it. The fact that the book barred from the school library may be available elsewhere is not decisive. What is significant is that the school has used its public power to perform an act clearly indicating that the views represented by the forbidden book are unacceptable. The impact of burning a book does not depend on whether every copy is on the fire. Removing a book from a school library is a less offensive act, but it can also pose a substantial threat of suppression.[73]

If a student's right to know is to depend on more than the existence of amicable courts, then the judicial latitude inherent in content based ad hoc balancing must be constrained by a definitional rule that clearly demarcates students' first amendment freedoms.

B. *A Definitional Approach to School Book Controversies*

By providing flexibility and certainty, the definitional approach establishes a framework for the exercise of both the school board's educational discretion and the students' right to know.[74] The definitional rule adopted in

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67. *Id.* at 95.

68. Ely, *supra* note 8, at 1497–1502.

69. *See* note 6 *supra*.

70. *Id.*

71. *See* text accompanying notes 79–91 *supra*.

72. 638 F.2d 404 (2d Cir. 1980), *cert. granted*, 50 U.S.L.W. 3265 (1981).

73. *Id.* at 434 (Newman, J., concurring). *See also* Nimmer, *supra* note 7, at 939. In the educational context the counterpart of the students' right to know is the teachers' first amendment right to academic freedom. It is unlikely that this right will remain unaffected by the chill created when books are officially disapproved. *See* Keefe v. Geanakos, 418 F.2d 359 (1st Cir. 1969) (teacher may not be discharged for the educational use of a "dirty" word in the classroom); Parducci v Rutland, 316 F. Supp. 352 (M.D. Ala. 1970) (teacher dismissal for assignment of a short story overturned in the absence of showing by school officials that it was educationally inappropriate).

74. *See generally* Nimmer, *supra* note 7.

Miller set a flexible standard that left local communities free to regulate obscenity at any point below a threshold minimum. This rule focuses on the point at which a local community has a constitutionally neutral objective to justify restricting expressive freedoms. At this point, regulation is based, not on content per se, but upon secondary effects and circumstances.[75] Similarly, in school book controversies, the application of definitional balancing must focus on a neutral school board rationale to justify the removal of books from public school libraries and the consequent infringement of the students' right to know.

Since a school's ultimate function is to educate its students, the definitional guidelines for the removal of school books must be based upon the educational qualities of a contested volume. In secondary schools, therefore, the preservation of a meaningful first amendment right to know is contingent upon the unfettered availability of books possessing educational value. Under the definitional approach proposed here a publication would possess educational value if, taken as a whole, it provided opportunity for an individual's adjustment to his or her environment through the fostering of social, cultural, political, economic, or scientific growth.

This definition is not, in the traditional sense of *Miller,* an exclusionary rule. Rather, it sets the scales on which a proper first amendment balance is struck. The proper analytical scales are those which mandate consideration of the values inherent in first amendment freedoms.[76] The "educational value" rule affirms the presumptive constitutionality which content based ad hoc balancing often denies. The standard set by the rule is necessarily high because school book exclusion is antagonistic to political speech, a core area in the first amendment's hierarchy of values.[77]

In a given school book case, the trier of fact would use the "educational value" rule as a base to determine whether a book's presence in the library was consistent with students' educational imperatives. The rule is a threshold standard, establishing high level first amendment protection to all books possessing educational value. Its imposition, however, does not diffuse the board's discretionary authority to guide the educational process.

The definition espoused above focuses on both the educational attributes of a contested book and the ability of students to understand and learn from it. One court has reasoned that as a "student advances in age, experience, information, and skills, the need for controlling the educational environment diminishes."[78] In operating within the definitional constraint, a school board would be empowered to take the above factors into account to determine the composition of the library. Thus, the educational value rule allows considerable local discretion in determining the educational exposure students receive

75. *See* text accompanying note 30 *supra.*
76. *See* text accompanying notes 79–91 *infra.*
77. *Id.*
78. Cary v. Board of Educ., 427 F. Supp. 945, 953 (D. Colo. 1977).

through the school library. In addition to providing flexibility for local school boards, the definitional approach furnishes students with a right to know grounded in certainty.

The definitional rule establishes library access rights and facilitates student action when local authorities go too far in attempting to limit exposure to controversial materials. Moreover, the very existence of a rule, as opposed to a line of amorphous balancings, makes it more likely that school boards will respect student rights in determining library resources. Beyond the rule itself, student certainty is promoted by the consistent judicial decision making that mandatory guidelines engender.

In contrast to the unbridled judicial latitude that inheres in content based ad hoc balancing, the definitional approach limits court discretion by mandating adherence to a rule. The rule provides the court with guidance in determining the limits of a school board's power to remove books. Further, as courts are obliged to balance the interests only within the confines of the rule, it is less likely that judicial prejudice will be the determinative factor in a school book decision. The result of additional guidance and less prejudicial influence will be consistent decision making by different courts and in different cases. Consistent adjudications will compound the certainty inherent in the rule.

In school book cases the content based nature of the school boards' regulation mandates the use of the definitional approach. Admittedly the educational value rule will preclude the removal of many contested books. There is, however, strong constitutional support for the educational diversity that the rule engenders.

IV. CONSTITUTIONAL SUPPORT FOR THE DEFINITIONAL APPROACH—THE EDUCATIONAL MARKETPLACE CONCEPT

At the foundation of the first amendment's system of expression is the concept of a "marketplace of ideas": "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market."[79] The existence of the educational marketplace is dependent upon a balanced presentation of ideas, not domination by a single political or social viewpoint. The educational marketplace concept has drawn support from a wide range of commentators and courts. Professor Thomas Emerson has reasoned:

> Ultimately any system of freedom of expression depends upon the existence of an educated, independent, mature citizenry. Consequently realization of the objectives of the First Amendment requires educational institutions that produce graduates who are trained in handling ideas, judging facts and argument, thinking

79. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). *See also* Red Lion Broadcasting v. FCC, 395 U.S. 367 (1969), in which the Supreme Court explained: "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail. . . . It is the right . . . to receive suitable access to social, political, esthetic, moral, and other . . . experiences which is crucial here. That right may not constitutionally be abridged. . . . "*Id.* at 390.

> independently, and generally participating effectively in the marketplace of ideas. Hence the First Amendment could be said to require . . . educational institutions that are capable of producing such results.[80]

Providing additional support for this doctrine is a long line of Supreme Court decisions that reflect the necessity of an educational marketplace. In *Meyer v. Nebraska*[81] the Supreme Court struck down a state statute that prohibited the teaching of foreign languages to students under ninth grade. Writing for the majority, Justice McReynolds found it "easy to appreciate" the desire of the legislature to foster homogeneous American ideals.[82] The Court held, however, that there was no state interest sufficient to justify the "consequent infringement of rights long freely enjoyed."[83] The first amendment interest in a broad educational exposure received further support in *West Virginia State Board of Education v. Barnette*.[84] In *Barnette* the Supreme Court held a mandatory flag salute statute unconstitutional. Justice Jackson elucidated the role of the first amendment in education:

> Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. . . . As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it will be. . . . Those who begin coercive elimination of dissent soon find themselves exterminating dissenters.[85]

In light of this concern, he addressed the role of education: "[T]hat (schools) are educating the young for citizenship is reason for scrupulous protection of Constitutional Freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our goverment as mere platitudes."[86]

Justice Jackson's *Barnette* opinion was later quoted approvingly and expanded upon by Justice Fortas in *Tinker,* in which it was explained that "[i]n our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved."[87]

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80. T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 613 (1970).

81. 262 U.S. 390 (1923).

82. *Id.* at 402.

83. *Id.* at 403.

84. 319 U.S. 624 (1943).

85. *Id.* at 640–41.

86. *Id.* at 637. *See also* Shelton v. Tucker, 364 U.S. 479 (1960), in which the Supreme Court maintained, "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Id.* at 487.

87. 393 U.S. 503, 511 (1969). *See also* Pacifica Foundation v. FCC, 556 F.2d 9 (D.C. Cir. 1977). The Sixth Circuit in Minarcini v. Strongsville City School Dist., 541 F.2d 577, 582 (6th Cir. 1976), found the removal of books to be a "much more serious burden upon freedom of classroom discussion than the action found unconstitutional in *Tinker*. . . ." In Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967), the Supreme Court explained, "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us. . . . That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. . . . The classroom is peculiarly the 'marketplace of ideas.'"

Finally, in school book cases themselves, substantial support can be found for the educational marketplace. In *Minarcini,* where book banning was disallowed, the Sixth Circuit explained that "a library is a mighty resource in the free marketplace of ideas," and therefore once the state or school board grants a library privilege to students, no conditions that relate "solely to the social or political tastes of school board members" could be placed on the use of that privilege.[88] Surprisingly, substantial support for the educational marketplace can be found in *Zykan,* the Seventh Circuit case that permitted the school board to remove disputed books. "To be sure," commented Judge Cummings, "the discretion lodged in local school boards is not completely unfettered by constitutional considerations."[89] The Constitution does not permit "rigid and exclusive indoctrination"[90] nor does it allow "a purge of all material offensive to single, exclusive perception of the way of the world."[91]

These cases provide strong constitutional support for the notion that the right to know mandates broad educational exposure. The definitional approach ensures such exposure by providing students with an educational marketplace in which to exercise their freedoms.

V. Conclusion

In adjudicating school book cases courts have improperly relied on the ad hoc balancing test. Those courts that have permitted local authorities to remove books from public school libraries have often used the ad hoc approach to conceal content based regulation of expression. The right to know is of little value if courts are free to balance away that right absent a countervailing, constitutionally neutral school board interest. The content based focus of school book ad hoc balancing leaves students unsure of their rights and courts unrestrained to reach any desired conclusion.

In public schools, a student's first amendment right to know is realized by the existence of an educational marketplace. The Supreme Court has concluded: "The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues' [rather] than through any kind of authoritative selection."[92] By providing certainty and constraining judicial latitude, the definitional approach ensures students the opportunity to engage in the robust exchange of the marketplace.

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88. 541 F.2d 577, 582 (6th Cir. 1976).
89. 631 F.2d 1300, 1305 (7th Cir. 1980).
90. *Id.* at 1306.
91. *Id.* at 1308.
92. Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) (quoting United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) (brackets in original)).